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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

STATE OF MISSOURI, at the Relation of MISSOURI INSURANCE COMPANY, a Corporation, Relator, Appellant (Petitioner),

v.

FREDERICK GEHNER, as Assessor of the City of St. Louis and as President of the Board of Equalization of the City of St. Louis; A. R. SCHOLLMEYER, CLYDE CARSON, WILLIAM L. HECKMANN and JOSEPH J. LICHTENFELD, as Members of the Board of Equalization of the City of St. Louis, Appellees (Respondents).

No. 222.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLEES (RESPONDENTS).

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STATEMENT.

Appellant, a Missouri corporation, is a life and accident insurance company. The appellees are the Assessor and President and Members of the Board of Equalization of St. Louis.

The company's tax return (Tr., p. 7) listed its assets as follows:

Real estate	$142,000.00
Bonds, municipal	289,000.00
Bonds, government	94,000.00
Mortgages	60,000.00
Cash	5,265.33
Total	$590,265.33

Classified as real estate, taxable personal property and nontaxable personal property, its assets consist of:

Real estate	$142,000.00
Taxable personal property	354,265.33
Nontaxable personal property	94,000.00
Total	$590,265.33

Its liabilities, as stated in the return (Tr., p. 8) are:

Legal reserve	$326,522.00
Unpaid policy claims (sick)	5,143.00
Unpaid policy claims (death)	1,821.00
Total	$333,486.00

The general law of the state, Section 12766, R. S. Mo. 1919, governing the return and assessment of property for taxation, provides that the taxpayer shall list all taxable property owned by him, or under his custody or control, with its value.

Appellant's property, if owned by an individual residing in the State of Missouri or by an ordinary Missouri corporation, would, under the general tax law of the state, be assessed for taxation as follows:

Real estate	$142,000.00
Taxable personal property	354,265.00
	$496,265.00

Section 6386, R. S. Mo. 1919, which governs the assessment and taxation of a domestic insurance company, requires it to return for taxation (1) all the real estate held or controlled by it; (2) the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals.

The pertinent parts of section 12766, section 6386, and certain provisions of the Constitution of the state which are mentioned in the argument, are set out in the appendix.

The company deducted the whole of its liabilities—legal reserve and unpaid policy claims—from its taxable property, to determine the amount of its taxable assets, and took credit for its real estate on which it was separately assessed, thus:

Total assets		$590,265.33
Government bonds, exempt		94,000.00
Taxable assets		$496,265.33
Real estate		142,000.00
		$354,265.33
Less:		
Reserve	$326,522.69	
Unpaid policy claims	6,964.00	333,486.69
		$ 20,778.64

The Board of Equalization, being of the opinion that section 6386 was unconstitutional, disallowed the deduction of the legal reserve and unpaid policy claims, and assessed the Company's real estate at $142,000.00 and its personal property at $50,000.00 (Tr., p. 15).

The Company then instituted this proceeding in certiorari in the Supreme Court of Missouri to quash the record of the assessment on its personal property in excess of $20,778.64.

While this cause was pending below, the constitutionality of section 6386 was upheld in other suits (Appellant's Brief, p. 5). The Board of Equalization conceding, then, that the statute is constitutional, contended that it authorized the assessment which was imposed upon the Company's net assets. The basis of this contention was that approximately 84 per cent of the Company's total assets were taxable, and, as there was no physical segrega-

tion of the funds representing its legal reserve and unpaid policy claims (liabilities) and the funds representing its net assets, its taxable property should be apportioned to those two funds in the ratio of their respective amounts, and that the taxable property so apportioned to the net assets should be assessed for taxation.

The Court below (Tr., p. 17) construed the statute as authorizing the Assessor to arrive at the taxable value of the Company's personal property in the following manner, to wit: allow it an exemption of $94,000.00 on its government bonds ($590,265.33—$94,000.00=$496,265.33); deduct the real estate on which it is taxed ($496,265.33—$142,000.00=$354,265.33); apply the ratio of taxable property, that is, 84 per cent, to the legal reserve and unpaid policy claims (84 per cent of $333,486.69=$280,128.81), and deduct this amount from the taxable personal property ($354,265.33—$280,128.81=$74,136.52).

As so computed, the value of the Company's taxable personal property was more than the assessment of $50,000.00 imposed by the Board of Education, and the Court below therefore refused to quash the assessment.

The Company's legal reserve and unpaid policy claims (liabilities) amount in the aggregate to $333,486.00 (Tr., p. 7), which represents approximately 56.5 per cent of its total assets. The remaining (approximately 43.5 per cent) of its total assets represents the net assets, taxation of which is provided for by the statute.

The different classes of property of which the assets consist, as indicated by the Company's return (Tr., p. 7), when apportioned between the legal reserve and unpaid policy claims (liabilities) and the net assets, are as follows:

	Liabilities 56.5%	Net Assets	Total
Government bonds	$ 53,110.00	$ 40,890.00	$ 94,000.00
Real estate	80,230.00	61,770.00	142,000.00
Taxable personal property	200,160.00	154,105.00	354,265.00
	$333,500.00	$256,765.00	$590,265.00

The Company has paid, or will be required to pay, taxes on the $80,230.00 of real estate allocated to its liabilities, as well as $61,770.00 allocated to its net assets. In computing the assessment on its net assets, the Company is therefore entitled to credit for $142,000.00 assessed against its real estate. The value of the balance of its net assets (taxable as personal property), therefore, is:

Total net assets		$256,765.00
Government bonds exempt	$ 40,890	
Real estate (taxed as other property)	142,000	182,890.00
Taxable net assets		$ 73,875.00

The appellant assigns as error and as a basis of federal jurisdiction (Tr., pp. 26, 27, 28) that the construction

placed upon the statute by the state court violates its rights under the due process and equal protection clauses of the Fourteenth Amendment.

The appellees contend that it is within the power of the state to tax all of appellant's assets except the $94,000.00 invested in Government bonds; that how the statute shall be construed is a matter of state law, so long as the construction adopted does not burden appellant's property with a greater tax than is imposed on the property of others, and does not, in fact, impose a tax on property which it is beyond the power of the state to tax; that, so construing the statute that appellant's taxes are computed by apportioning its taxable property between its liabilities and its net assets does not violate appellant's rights under the Constitution or laws of the United States; that the appellant's right to deduct any part of its liabilities from its tax return is derived from the state statute, or does not exist; and that, if the statute as construed by the state court violates the Constitution or laws of the United States, it is unconstitutional, and all of appellant's property, except its Government bonds, are taxable under the laws of the state.

BRIEF.

I.

(a) The nature of a tax, and the property upon which it is levied, are important elements in determining its validity.

(b) Section 6386, R. S. Mo. 1919, provides a system of taxation of the net assets of domestic insurance companies.

State ex rel. v. Schramm, 271 Mo. 223.

(c) A Missouri insurance company is required to return for taxation its real estate and all other assets in excess of its legally required reserve and unpaid policy claims.

Sec. 6386, R. S. Mo. 1919.

(d) Section 6386, as construed by the court below, in effect authorizes the Assessor to allocate a fair amount of the nontaxable securities of an insurance company to its net assets, and to assess the net assets as the property of an individual.

Opinion below (Tr., p. 17).

Where the same result is obtained by either of two methods it is immaterial which is adopted.

Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530.

(e) It is the judgment and not the opinion of the lower court that is reviewed by an appellate court, and the judgment, if correct, ought not to be reversed, even if the appellate court does not agree with the reasoning on which it is based.

4 C. J. 1080, Note 95;
M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 340.

II.

(a) Section 6386, as construed below, does not deny tax exemption to Government bonds.

(b) The statute, as construed below, allocates a fair proportion of appellant's Government bonds to its net assets and imposes an assessment only on its taxable net assets.

Opinion below (Tr., p. 17).

(c) The Government bonds allocated to the reserve and unpaid policy claims are not taxed.

(d) The language of an opinion is not necessarily controlling on an issue not before the Court when it was used.

Pacific Steamship Co. v. Peterson, 278 U. S. 130.

III.

(a) Appellant, in making its tax return, has no right under the Constitution or laws of the United States to apportion all of its Government bonds to its net assets.

(b) The decision of the Supreme Court of Missouri denying the appellant the right, in making its tax return, to apportion all of its Government bonds to its net assets does not violate appellant's right under the due-process clause or the equal-protection clause of the Fourteenth Amendment.

(c) The record presents only one question, to wit: Does the decision of the state court violate appellant's right, under the Constitution and laws of the United States, by denying it the right, in making its tax return pursuant to section 6386, to apportion all of its Government bonds to its net assets?

(d) Section 6386, if so construed as to permit an insurance company, in making its return, to apportion all of its Government bonds to its net assets is unconstitutional.

> State ex rel. American Automobile Ins. Co. v. Gehner, 8 (2d) S. W. 1057, l. c. 1059.

(e) If this Court should so construe Section 6386, R. S. Mo. 1919, as to permit the appellant, in making its tax return, to allocate all of its Government bonds to its net assets, the result, in effect at least, would be to amend a statute of the state.

(f) Whether a state statute imposing a tax violates the Federal Constitution depends upon its operation and practical effect.

International Paper Co. v. Massachusetts, 246 U. S. 135.

(g) By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property, it is not open to attack as in conflict with the Constitution of the United States.

Postal Telegraph Co. v. Adams, 155 U. S. 686, l. c. 697;

Galveston, Harrisburg & San Antonio Railroad v. Texas, 216 U. S. 217, l. c. 227;

New York, L. E. & W. Ry. Co. v. Pennsylvania, 158 U. S. 431, l. c. 438.

ARGUMENT.

I.

Nature of Ruling Below and Issue Here.

In determining the power of the state to impose a tax, the first useful step is to ascertain with precision the nature of the tax and upon what property it is levied; and that step must be taken by an examination of the taxing law as interpreted by the Supreme Court of the State (Home Savings Bank v. Des Moines, 205 U. S. 503, l. c. 510).

Section 6386, R. S. Mo. 1919, pursuant to which the tax was imposed, provides:

> "Sec. 6386. **Home Companies Subject to What Tax.** The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: *First of all, the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals.*"

The nature of the tax and the property upon which it is levied were definitely established by a prior decision

of the Supreme Court of Missouri, when, in State ex rel. v. Schramm, 271 Mo. 223, in speaking of what is now section 6386, it said (l. c. 226):

> "The statute (section 7098) prescribes a system of taxation of net assets."

The words of the statute set out in italics are susceptible of no other construction than that it prescribes a system of taxation of net assets, which, as the language indicates, shall be assessed as the property of individuals.

It appears from appellant's return (Tr., p. 7) that 84 per cent of its assets are taxable.

The Court below (Tr., p. 17) construed the statute as authorizing the Assessor to deduct that part of the liabilities which consists of taxable property, that is, 84 per cent of the reserve and unpaid policy claims, from the taxable assets, and assess the balance for taxation.

It computed the assessment which the Assessor was authorized to make as follows:

Total assets	$590,265.33
Government bonds (exempt)	94,000.00
Taxable assets	$496,265.33
Real estate, taxed	142,000.00
Total taxable personal property	$354,265.33
Reserve, consisting of taxable property, 84 per cent of $333,486.69	280,128.81
Net taxable personal property	$ 74,136.52

In discussing the construction to be placed upon the statute, the Court said (Tr., p. 17):

> "Section 6386 relates to the taxation of domestic insurance companies. With reference to every such company it provides that the net value of all its personal assets, or assets, or values, in excess of the legally-required reserve necessary to reinsure its outstanding risks and unpaid policy claims, shall be assessed and taxed as the property of individuals. The section, of course, deals only with property which is subject to taxation. The question in this case is: 'How shall the net value of the taxable assets be determined?' Relator claims, inferentially, that it has put its legal reserve and working capital into other securities, which are subject to taxation; and that therefore the reserve and all other liabilities should be deducted from the taxable assets alone. But surplus, earnings, undivided profits, etc., are mere bookkeeping terms. The legal reserve is not a segregated fund; it is a measure of liability, a test of solvency; the amount that would be required to make a present settlement with all of relator's policyholders, or to reinsure its risks; it is an indebtedness (State ex rel. Missouri State Life Insurance Co. v. Gehner, 8 S. W. [2d] 1068, 1072). And relator's indebtedness, legal reserve and unpaid policy claims, is a charge against all of its assets, both taxable and nontaxable.
>
> * * * * * * *
>
> "We know of no more equitable way to determine such value than that of apportioning the total liability between the two classes of assets (the taxable and the nontaxable) according to their respective amounts

and then deducting from the taxable assets the liability so apportioned to that class."

The same result would have been reached had the Assessor apportioned the taxable property to the net assets, exempted that part of the net assets which consisted of government bonds, and taxed the balance.

The assets of the Missouri Insurance Company, as disclosed by its return to the tax assessor (Tr., p. 7), consist of:

Real Estate	$142,000.00
Government Bonds	94,000.00
Taxable Personal Property	354,265.33
Total	$590,265.33
Its Liabilities, Consisting of Legal Reserve and Unpaid Policy Claims are	$333,486.00

Its legal reserve and unpaid policy claims (liabilities) aggregate $333,486, which represents (approximately) 56.5% of its total assets. The remaining (approximately) 43.5% of its total assets represents the net assets, the taxation of which is provided for by the statute.

The different classes of property, of which the assets consist when apportioned between the legal reserve and unpaid policy claims (liabilities) and the net assets, are as follows:

	Liabilities 56.5%	Net Assets 43.5%	Total
Government Bonds	$ 53,110	$ 40,890	$ 94,000
Real Estate	80,230	61,770	142,000
Taxable Personal Property	200,160	154,105	354,265
	$333,500	$256,765	$590,265

The whole of the company's real estate is taxable. It has paid, or will be required to pay, taxes on the $80,230 of real estate allocated to its liabilities, as well as the $61,770 allocated to its net assets. In computing the assessment on its net assets, the company is therefore entitled to credit for having paid a tax on real estate in the amount of $142,000. The value of the balance of its net assets (taxable personal property) for the purpose of taxation, then, is computed as follows:

Total Net Assets		$256,765.00
Government Bonds Exempt	$ 40,890	
Real Estate (Taxed as other Property	142,000	182,890.00
Taxable Net Assets		$73,875.00

The result thus obtained varies slightly from that arrived at by the Missouri Supreme Court, because both computations are based on approximate percentages.

Whether that part of the reserve and unpaid policy claims which consists of taxable property is deducted from

the Company's total taxable property and the assessment is imposed on the remainder, or whether the taxable property is apportioned between the reserve and unpaid policy claims (liabilities) and the net assets, and the assessment is imposed on that part of the net assets which consists of taxable property, is a mere matter of which method of calculation shall be adopted, and the result is the same.

An appellate court reviews the judgment and not the opinion of a lower court, and the judgment ought not to be reversed, although the appellate court may be unable to agree with the reasons given for a decision which is correct (4 C. J. 1080, Note 95).

This principle was recognized and applied by this Court as early as 1820 (M'Clung v. Silliman, 6 Wheat. 598, 5 L. ed. 346).

In that case the Supreme Court of Ohio assumed jurisdiction in a case wherein application for mandamus was made against an officer of the United States, but declined to issue the writ on the merits. On writ of error to this Court, although it was held that the state court was without authority to assume jurisdiction in the cause, its judgment denying the writ was affirmed.

II.

The Statute as Construed Below Does Not Deny Government Bonds Exemption From Taxation.

It is not claimed that section 6386 as construed by the Missouri Supreme Court imposes a tax directly on Gov-

ernment bonds. The contention is that an insurance company which is taxed on its net assets is denied exemption from taxation on Government bonds when the taxing authorities treat such bonds as being invested in part in the net assets and in part in the legal reserve and unpaid policy claims.

The appellant cites and discusses decisions of this and other courts, the language of the opinion in some of which, without giving consideration to the facts in respect to which it was used, would appear to lend color to the claim that appellant has not been given exemption from taxation on the full amount of its Government bonds. For this reason, it will be necessary to discuss in detail some of the cases on which appellant relies.

The tax declared illegal in McCullouch v. Maryland, 4 Wheat. 316, and Weston v. City of Charleston, 2 Pet. 448, was imposed directly upon the obligations of the United States, as is also that prohibited by Section 3701, U. S. Revised Statutes (U. S. Comp. Stat., Sec. 6816).

Appellant says that, in National Life Insurance Co. v. United States, 277 U. S. 508, we find an analogous situation. The Act of Congress, in that case, imposed an income tax on insurance companies. A deduction of 4 per cent on the reserve was allowed, but, as the income on nontaxable securities was not included in the gross income, the deduction was decreased by an amount corresponding to the income on nontaxable securities. As a result, if the Company's income in part was from non-

taxable securities, its net income, upon which the tax was imposed, was the same as if its income was derived wholly from taxable investments. This appears from the opinion, which (l. c. 518) says:

> "The collector treated interest plus dividends plus rents, $3,824,592.78, as gross income, and allowed deductions amounting to $2,899,690.79, made up of the following items: $1,125,788.26, interest from tax-exempt securities; $1,569,490.86, the difference between 4 per cent of the reserve fund ($2,695,279.12) and ($1,125,788.26) interest received from exempt securities; miscellaneous items, not contested and negligible here, $204,411.67. After deducting these from total receipts ($3,824,592.78—$2,899,690.79), there remained a balance of $924,901.99. This he regarded as net income and upon it exacted 10 per centum, $92,490.20.
>
> "If all interest received by the company had come from taxable securities, then, following the statute, there would have been deducted from the gross of $3,824,592.78—4 per cent of the reserve, $2,695,279.12, plus the miscellaneous items $204,411.67—$2,899,-690.79, and upon the balance of $924,901.99 the tax would have been $92,490.20. Thus it becomes apparent that petitioner was accorded no advantage by reason of ownership of tax-exempt securities."

It is apparent that, by calculating the net income by this method, the company would have been subjected to the same tax if its entire gross income had been received as interest on Government securities. The effect of the act, in that case, cannot be analogous to the effect of the stat-

ute in this case, because the larger the amount of nontaxable securities this appellant owned, the less tax it would be required to pay on its net assets, and, if all of its assets were invested in nontaxable securities, it would be required to pay no taxes whatever.

In City of Waco v. Amicable Life Insurance Co., 230 S. W. (Tex. App.) 698, 248 S. W. (Tex. Com. of Ap.) 332, the statute authorized the company to deduct its reserve as a liability. The taxing authorities sought to diminish the liabilities deducted to the extent of the nontaxable securities owned by the company; in other words, to treat all of the nontaxable securities as though they were invested in the reserve. It was held that, as the reserve did not constitute any specific property set apart from the general assets, the tax-exempt securities should be first deducted from the total assets, and then the reserve should be deducted. The right of the State to apportion the taxable and nontaxable property to the reserve and to the net assets, and assess the taxable property, of which the net assets consisted, was not ruled on in that case.

In Farmers' and Merchants' Bank v. Minnesota, 232 U. S. 516, the facts as stated by the Court (l. c. 520) are:

> "Plaintiff in error is a savings bank, having no capital stock, and was taxable under Sec. 839, Rev. Laws 1905, which provides for ascertaining the surplus remaining after deducting from its assets (other than real estate, which is separately assessed) the amount of the deposits and of all other accounts payable; the surplus to be taxed as credits."

The tax involved was one imposed directly on federal securities (bonds of a municipality of the Territory of Oklahoma). What the Court said in that case must be construed in connection with the facts before it, and is, therefore, not necessarily applicable to the facts here, where the assessment is only on that part of the net assets which consist of taxable property.

In Northwestern Mutual Life Insurance Company v. Wisconsin, 275 U. S. 136, life insurance companies were required to pay a license fee of 3% on their gross income from all sources excetping income from taxable real estate and premiums on policies. The gross income thus computed included interest on securities of the United States. That case is not in point, because the tax was levied directly upon the income of Government securities, and obviously, the company's income would have been taxable even if derived wholly from interest on Government bonds.

In Miller v. Milwaukee, 272 U. S. 713, the facts as stated by appellant are that the Wisconsin law excepted from the income tax of corporations interest received on United States bonds; that the exemption was met by the State of Wisconsin by a provision that, while stockholders were not taxed upon dividends received from corporations, the income of which was assessed, yet, if only part of the corporation's income was assessed, only a corresponding part of the dividends received therefrom should be deducted from the income tax to the shareholder. A mere statement of the facts, we think, shows that the case is not

applicable, because, in the instant case, the tax is assessed only upon that part of the appellant's net assets which consists of taxable property.

In Home Savings Bank v. Des Moines, 205 U. S. 503, the statute involved provided that shares of stock of state banks should be assessed to such banks, and not to the individual shareholders. The bank owned United States bonds, which were included in the value of the stock assessed against the corporation. It was held, in effect, that, to include the Government bonds in the value of the shares, which was assessed against the bank, was equivalent to assessing the bonds, which it was beyond the power of the state to assess. No such situation is presented by the facts in our case. It is admittedly within the power of the State of Missouri to assess appellant's $590,265 worth of property, except the $94,000 of Government bonds which it owns. The statute, as construed by the state court in the present case, authorizes the Assessor to apportion the taxable and nontaxable property between two funds, one of which (net assets) the appellant owns and holds for its own use and profit, and the other of which (legal reserve and unpaid policy claims) it technically owns but holds for the benefit and protection of its policyholders, and to assess against it the taxable portion of the fund which it owns outright and relieve it from taxation on the other fund, which it holds in trust for its policyholders.

In State ex rel. v. Schramm, 271 Mo. 223, which is cited in Farmers Bank v. Minnesota, supra, the Assessor under-

took to allocate the whole of the nontaxable property of an insurance company to its legal reserve and unpaid policy claims. It was not suggested in that case that the statute authorized the Assessor to apportion the taxable property of the company between its net assets, which it held and owned for its own profit, and its legal reserve, which it technically owned but held for the protection of its policyholders, and assess the taxable portion of the net assets as the property of an individual is assessed; and the Supreme Court of Missouri did not hold that an assessment, the amount of which was arrived at in that manner, could not be lawfully imposed upon the net assets of an insurance company.

III.

Due Process and Equal Protection.

Appellant quotes from State ex rel. v. Schramm, 271 Mo., l. c. 227, where the Supreme Court of Missouri said:

> "Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. The allowance is not in any sense an exemption, but is made by way of reaching the just amount of taxable property."

The statute could not be held constitutional on any other theory, because the Legislature of Missouri has no power to grant exemptions from taxation except on the property

mentioned in Section 6 of Article X of the State Constitution (see appendix). In State ex. rel. v. Schramm, supra, the Court also said that the statute provides a system of taxation of net assets. The statute as construed below does no more than to authorize the taxation of **that part of the net assets which may fairly be said to consist of taxable property.**

Appellant also quotes from State ex rel. v. Buder, 315 Mo. 791, as follows:

> "To hold that the reserves of a domestic insurance company are proper subjects of taxation would be to ignore the plain terms of the statute which we have just ruled has not been repealed."

The statute as construed does not tax the appellant's reserve.

Our attention is directed to State ex rel. v. Gehner, 8 S. W. (2nd) 1068, where the Supreme Court of Missouri upheld the constitutionality of section 6386. Appellees concede that the statute as construed by the court below is constitutional.

We are next cited to the following cases, to wit:

State ex rel. American Automobile Ins. Co. v. Gehner, 8 S. W. (2d) 1057;

State ex rel. Citizens Ins. Co. v. Gehner, 8 S. W. (2d) 1066;

State ex rel. Indemnity Co. of America v. Gehner, 8 S. W. (2d) 1067;

State ex rel. International Life Ins. Co. v. Gehner, 8 S. W. (2d) 1067;
State ex rel. Missouri State Life Ins. Co. v. Gehner, 8 S. W. (2d) 1068;
State ex rel. Central States Life Ins. Co. v. Gehner, 8 S. W. (2d) 1073.

A reading of these cases, it is asserted, will show that the law of the State of Missouri is that a domestic insurance company, under section 6386, having no tax-exempt securities, may deduct its entire reserve. If this appellant had no tax-exempt securities, the whole of its legal reserve and unpaid policy claims and its **net assets** would consist of taxable property, and, after deducting the whole of its reserve (and unpaid policy claims), it would be assessed on **all of its net assets.** Under the statute, as construed below, its assessment would then be computed as follows:

Assets	$590,265.33
Legal reserve and unpaid policy claims	333,486.69
	$256,778.64
Real estate, otherwise taxable	142,000.00
Taxable personal property	$114,778.64

Appellant, on the same page of its brief (p. 30), also says that, in three of the last-mentioned cases, it was expressly held that no assessment could be made where the amount of the reserve exceeded the amount of the taxable assets. The taxing authorities did not assert their right to appor-

tion the taxable property to the liabilities and the net assets, and their right to do so, therefore, was not ruled on.

What the Supreme Court of Missouri decided in these cases was, that section 6386 is constitutional. The Court passed upon the **constitutionality** of the statute, and not upon its **construction.** In one of the cases, State ex rel. American Automobile Insurance Co. v. Gehner, 8 (2d) S. W. 1057, supra, the Missouri Supreme Court did, however, clearly intimate that section 6386, if so construed as to permit an insurance company to apportion none of its nontaxable assets to its legal reserve, would be unconstitutional. The company in that case claimed that money on deposit outside of the state was nontaxable, and in reporting its net assets for taxation did not apportion any of its assets represented by such deposits to its legal reserve and unpaid policy claims. In discussing this phase of the company's return, the Court (l. c. 1059) said:

> "Yet all those liabilities are listed against the assets said to be in this state, and not apportioned in any way to the assets said to be out of this state. The inequity of that position should have appealed to the company in preparing its return.
>
> "Since all liabilities for policy claims are to be paid out of assets in this state, the bank deposits and premiums to be collected outside of the state are used for no purpose out of the state, but must be transmitted to the home office and become available to pay such claims, or to replace state funds used for the purpose. Thus a double deduction is inevitable.

The foreign claims are deducted, and the foreign collections out of which they are finally to be paid are deducted, from the assets. Common justice would require that claims arising in other states, on policies insuring property in other states, and paid ultimately out of the premiums collected on such policies, out of which the claims arose, **should not be listed as liabilities against assets in Missouri.** But relator strenuously contends for a narrow technical construction of section 6386, which would not only defeat its purpose, but defeat the policy of the state to maintain equality in taxation, in accordance with the demands of the Constitution.

"Further, the reserves are almost half the total assets. In what are they invested? More than one-third of the total assets are listed as either tax-exempt or out of the state. There are not enough taxable assets in the state, after paying the listed claims, to account for the reserves. Therefore, it is inevitable that the reserves are invested, in large amounts, in tax-exempt securities, or they appear in property out of the state. Thus another double deduction appears: **The reserves are deducted, and the securities and other property in which they appear as assets are deducted.** Section 6386 should not be construed so as to permit such an evasion of the constitutional requirement." (Bold type ours.)

The appellant's right to have the amount of the assessment on its personal property determined in the manner prescribed by Section 6386, R. S. Mo. 1919, rests on that statute, or it does not exist. The statute means what the highest court of the state has construed it to mean, or, in

contemplation of law, it does not exist, and personal property to the value of over $350,000.00 owned by appellant is subject to taxation under Section 12766, R. S. Mo. 1919.

We are not contending that this Court cannot, in a proper case, place its own construction upon a statute enacted by a state, but a proper case is one where the statute as construed denies the complaining party a right conferred upon it, not by the statute itself, but by the Constitution or laws of the United States, independent of the state statute. In this case, the right of appellant to have only its net assets subjected to taxation is conferred by the state law, and not by the Fourteenth Amendment, under which the appellant claims. It is only reasonable to say that when a state statute, as construed by the Supreme Court of the state, results in the imposition of a smaller assessment on the personal property owned by appellant than would be imposed upon the same property if owned by a person or corporation to whom the state statute does not apply, there can be no invasion of the appellant's rights under the Fourteenth Amendment.

Appellant says (Brief, p. 31) that the construction placed upon the statute below means "if you invest a part of your assets in Government bonds we will refuse to grant you the right to deduct the full amount of your reserve. This, in effect, means if you invest your assets in Government bonds we will tax them."

We have heretofore shown, we think, that the statute as construed below does no more than to tax the portion of

the company's net assets which consists of taxable property.

We concede that the equal-protection clause of the Fourteenth Amendment is designed to prevent intentional and arbitrary discrimination, whether occasioned by the terms of a statute or by its improper execution, as was held in Sunday Lake Iron Co. v. Wakefield, 247 U. S., l. c. 352. In that case it was claimed that the plaintiff in error was denied the equal protection of the law, because its property was assessed at full value, and other property throughout the county generally was assessed at not exceeding one-third of its value. The case, therefore, is not in point. As a matter of fact, the appellant in the present case is assessed $50,000.00 on personal property in the State of Missouri, which, if owned by an individual or an ordinary corporation, would have been assessed at more than $350,000.00.

Appellant quotes from the opinion in Southern Ry. v. Green, 216 U. S., l. c. 412, as follows:

> "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation. If the plaintiff is a person within the jurisdiction of the State of Alabama within the meaning of the Fourteenth Amendment, it is entitled to stand before the law upon equal terms, to enjoy the same rights as belong to, and to bear the same burdens as are imposed upon, other persons in a like situation."

If the rule stated in that case were applied literally to the appellant, it would be required to pay taxes on personal property, amounting to (Tr., p. 7) over $350,000.00.

What the Court held in Southern Railway Co. v. Green, supra, was that a license tax on a foreign corporation greater than that imposed on a domestic corporation enjoying the same privileges violates the equal-protection clause of the Fourteenth Amendment.

The case of Quaker City Cab Co. v. Pennsylvania, 277 U. S. 402, from which appellant quotes at page 34 of its brief, is not applicable. What was decided there was that the imposition of a tax on the gross receipts of corporations operating taxicabs without imposing like taxes on the receipts of individuals and partnerships engaged in the same business deprives the corporations of the equal protection of the law.

Practically all of the states treat the legal reserve of an insurance company as a fund held for the protection and security of the policyholders, and have adopted laws designed to keep it intact. This policy is reflected in the taxing laws of many of the states. In Missouri it led to the enactment of section 6386, by which insurance companies are taxed only on their net assets in excess of their legal reserve and unpaid policy claims. The highest court of the state has construed this statute to mean that in determining what part of appellant's assets is reserve set aside for the security of its policyholders, and what part

is net assets belonging to the appellant and held for its own profit, the Assessor can make a division of the nontaxable property between those two funds. The appellant has no right, under the Constitution or laws of the United States, to allocate all of its nontaxable property to its net assets, and the Missouri Supreme Court has held that it has no such right under the statute. The question, it would appear, is one of state law, in which the decision of the state court ought to be final. For this Court to hold that the Assessor cannot apportion the appellant's taxable and nontaxable property to its reserve and to its net assets would increase the extent to which the state has granted appellant immunity from taxation, and would, in effect at least, amend a statute of the state.

If the statute as construed enabled the state through some subterfuge or legal fiction to bring within the reach of the tax collector property that is exempt from taxation because of some provision of the Federal Constitution or laws, the appellant would be in a position to complain in this court. Such a case is not presented by the record. The appellant owns taxable personal property within the State of Missouri (Tr., p. 7) valued at more than $350,000.00, all of which would be subject to taxation under the laws of the state if owned by an individual or an ordinary corporation. Section 6386, as construed by the highest court of the state, authorizes the Tax Assessor to equitably apportion that and all other property appellant owns between two funds—its legal reserve and unpaid

policy claims held for the protection of its policyholders and its net assets, owned and held for its own use and benefit, and to assess that part of the personal property apportioned to the net assets. The assessment actually made against the appellant's personal property is only $50,000.00, although in the absence of the statute its personal property might have been assessed for more than $350,000.00 without violating any right which it claims under the Constitution or laws of the United States.

This Court, when considering the effect of the interstate commerce clause of the Constitution of the United States on the validity of license or privilege taxes imposed by the states, has many times ruled, in substance, that the validity of the statute depended upon its operation and practical effect (International Paper Co. v. Massachuetts, 246 U. S. 135), and that by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon the property, it is not open to attack as in conflict with the Constitution.

Postal Telegraph Co. v. Adams, 155 U. S. 686, l. c. 697;

Galveston, Harrisburg & San Antonio Ry. Co. v. Texas, 210 U. S. 217, l. c. 227;

New York, L. E. & W. Ry. Co. v. Pennsylvania, 158 U. S. 431, l. c. 438.

So far as we are able to ascertain, the exact question raised in the case now before the Court has never been ruled upon.

It would seem, however, that, whether the claim is made that the result of the statute is to impose a tax upon securities of the United States, or to impose a burden upon interstate commerce, the rule ought to be the same; that is to say, that the validity of the tax depends upon the effect and operation of the statute, and that if the tax imposed pursuant thereto is no greater than the tax ordinarily imposed upon property generally within the state, it is not open to attack as in conflict with the equal-protection clause or due-process clause of the Constitution.

CONCLUSION.

Appellant's right to deduct from its taxable property any part of its legal reserve and unpaid policy claims is not a privilege or immunity conferred by the Constitution or laws of the United States, but is derived from the state statute, or does not exist. Under its previous decision in State ex rel. American Automobile Company v. Gehner, 8 (2d) S. W. 1057, supra, the state court held, in effect, that for an insurance company, in making its tax return to apportion the whole of its reserve and unpaid policy claims to its taxable property would defeat the purpose of the statute, by bringing it into conflict with the Constitution of the state. The court below, in this case, construed the statute as authorizing the Assessor to apportion a fair amount of the nontaxable property of an insurance company to its net assets, and to tax the net assets so determined as the property of an individual. Unless the

statute, as construed by the state court, is valid, all of appellant's property, except $94,000, which is invested in Government bonds, is subject to taxation under the general laws of the state.

We have heretofore submitted briefs in opposition to jurisdiction on appeal and on certiorari, and respectfully ask that they be considered in connection with our brief on the merits.

We submit that on the record the appellant is not entitled to relief from the assessment made upon its net assets, and that if the Court retains jurisdiction, the judgment of the state court should be affirmed.

Respectfully submitted,

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APPENDIX.

Sections 6 and 7 of Article X of the Constitution of Missouri are as follows:

"Sec. 6. **Property exempt from taxation.**—The property, real and personal, of the state, counties and other municipal corporations, and cemeteries, shall be exempt from taxation. Lots in incorporated cities or towns, or within one mile of the limits of any such city or town, to the extent of one acre, and lots one mile or more distant from such cities and towns, to the extent of five acres, with the buildings thereon, may be exempted from taxation, when the same are used exclusively for religious worship, for schools, or for purposes purely charitable; also such property, real or personal, as may be used exclusively for agricultural or horticultural societies: **Provided**, That such exemptions shall be only by general law.

"Sec. 7. **Other exemptions void.**—All laws exempting property from taxation, other than the property above enumerated, shall be void."

The general law of the state governing the return and assessment of property for taxation (Section 12766, Revised Statutes of Missouri 1919, as amended, Laws of Missouri 1923, page 275), so far as here material, provides:

"Sec. 12766. The Assessor * * * shall * * * proceed to take a list of the taxable personal property in his county, town or district and assess the value thereof in the manner following, to wit: He shall call at the office, place of doing business or residence of each person required by this chapter to list property, and shall require such person to make a correct state-

ment of all taxable property owned by such person, or under the care, charge or management of such person, except merchandise, which may be required to pay a license tax, being in any county of this state, in accordance with the provisions of this chapter; and the person listing the property shall enter a true and correct statement of such property on a printed or written blank prepared for this purpose * * *."

Section 6386, Revised Statutes of Missouri 1919, so far as pertinent, reads:

"Sec. 6386. **Home companies subject to what tax.**—The property of all insurance companies organized under the laws of this state shall be subject to taxation for state, county, municipal and school purposes, as provided in the general revenue laws of this state in regard to taxation and assessment of insurance companies. Every such company or association shall make returns, subject to the provisions of said laws: First, of all the real estate held or controlled by it; second, of the net value of all its other assets or values in excess of the legally required reserve necessary to reinsure its outstanding risks and of any unpaid policy claims, which net values shall be assessed and taxed as the property of individuals."